

**TIPPING TOWARD CIVILITY: DEVELOPING COLLABORATIVE LAW IN THE U.S. AND
CANADA**

By Rebecca Glass

“Never cut what can be untied.” – Chinese proverb

I. Introduction

Collaborative law is an inspirational new model for “untying” conflict and resolving disputes. Though lawyers are increasingly using collaborative law in employment, commercial and other areas,^{1[1]} the movement’s origins and most proven successes, from both the practitioner and client perspective, are in family law. In that context, collaborative law is relatively inexpensive,^{2[2]} promotes creative, “win-win” resolutions, facilitates civilized, productive meetings between divorcing spouses, and offers greater peace of mind to its participants. It hardly seems necessary to catalogue the evils of its main alternative, divorce

^{1[1]} PAULINE H. TESLER, COLLABORATIVE LAW 224 (Section of Family Law, American Bar Association 2001) (hereinafter “Tesler book”).

^{2[2]} In the U.S., the cost for an average collaborative divorce ranges from \$2,000 - \$5,000. See Rochelle Williams, “Collaborating Instead of Cursing,” Marin Independent Journal, March 24, 1999. A Canadian practitioner estimates that the cost of completing a collaborative law case is about a half to two-thirds the cost of preparing a traditional case right up until the point of trial. “A Brief History of Collaborative Family Law,” Quinte Collaborative Law Association, February 26, 2003, available at http://www.quintecollaborative.org/QCLA_History.html, last viewed 4/19/03 (hereinafter “Quinte”).

litigation.^{3[3]} For now, it should suffice to quote California Court of Appeals Justice Donald M. King: “Family law court is where they shoot the survivors.”^{4[4]}

Just thirteen years old,^{5[5]} collaborative law is rapidly catching on in North America. For some of us, however, the movement and its accompanying social good cannot penetrate the American legal system quickly enough. This paper was born from and thus reflects its author’s impatience at the lag between steady-but-early growth and all-out transformation. It will first describe collaborative law, contrasting it with both litigation and mediation; then it will trace the movement’s development in the United States and in Canada. Finally, it will draw upon recent sociological scholarship to help explain this development and postulate what needs to be done to achieve mainstream status for collaborative law.

A. Not Just a Catchy Name: Defining Collaborative Law^{6[6]}

A “cousin” of mediation, collaborative law negotiation takes place outside of the courtroom. Its central tenet is that both parties’ lawyers stipulate at the beginning that both will withdraw from representation if either party threatens or

^{3[3]} I will compare collaborative law and litigation in greater depth in Section IB.

^{4[4]} Tesler book, at 3.

^{5[5]} Nora Bushfield, “History and Development of Collaborative Law,” *available at* http://www.iah.org/articles/04_History_and_Development.htm last viewed 4/19/03.

^{6[6]} A quick proviso: due to space limitations, this section will be very cursory; readers are encouraged to seek out Pauline Tesler’s book for a more thorough description.

elects to go to court.^{7[7]} If a party's lawyer learns that her client is negotiating in bad faith (for example, by misrepresenting relevant information), the attorney must withdraw from or terminate the case immediately.^{8[8]} In addition, the parties, who must self-select the process,^{9[9]} commit to avoid litigation and instead "[rely] on an atmosphere of honesty, cooperation, integrity and professionalism."^{10[10]} All disclosure is voluntary, full, and honest,^{11[11]} and all experts or nonlegal professionals work as consultants for the entire group. Should the collaborative process terminate, the consultants are disqualified as witnesses and their work product is inadmissible.^{12[12]} All of these factors serve to promote good-faith problem solving, and to discourage the parties from "lightly electing to litigate."^{13[13]} Moreover, because both parties have chosen to participate in this process, suspicion and paranoia about the other side's intent decline dramatically.^{14[14]}

^{7[7]} Tesler book, at xx.

^{8[8]} *Id.* at 145.

^{9[9]} See Pauline H. Tesler, lecture at Boalt Hall negotiations class (April 4, 2003) (hereinafter "Tesler lecture").

^{10[10]} Tesler book, at 143, Form 4: "Principles and Guidelines for the Practice of Collaborative Law."

^{11[11]} *Id.*

^{12[12]} *Id.* at 144-45.

^{13[13]} Pauline H. Tesler, "Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It," 13 Am. J. Fam. L. 215, 220 (1999).

^{14[14]} *Id.* One fitting metaphor for the team-orientation encouraged in collaborative law is mountain climbing. At different points in the climb, the entire party is roped together for

There are three phases to a typical collaborative representation. In the first, the Opening Moves stage, the lawyer lays a foundation for successful representation by communicating a great deal of information to the client about the process.¹⁵[15] The lawyer holds out consistent, clear expectations that the clients can and should resolve the dispute in a civilized manner.¹⁶[16] These expectations include an explicit understanding that the lawyer will only represent the client's "highest intentioned self" (one able to take the long view), and not the client's emotional, "shadow" self (one flooded with intense feelings, which can destabilize and compromise the client's abilities to cope and plan).¹⁷[17] Also at this first stage, the lawyer makes the first contact with the other party or other lawyer; conducts a pre-meeting with her client to set the agenda for the first group meeting; and has a pre-meeting with the other counsel.¹⁸[18] The pre-meetings serve the general purpose of getting on the same page philosophically and setting a detailed agenda for the first group meeting (specifically what must

everyone's safety. Elbowing and shoving, trying to get every little advantage, and failing to pay attention to the agreed rules jeopardizes the whole expedition. See Jill Kramer, "Civilized Divorce," *Pacific Sun* 1, March 4, 1998. Working collaboratively is not only best for the group as a whole, but for each individual's enlightened self-interest. For other metaphors, see Tesler book, at 208.

¹⁵[15] Tesler book, at 55. See *also* Tesler book, at 137, Form 3: Collaborative Law Retainer Agreement for the kind of formal documentation occurring at this stage.

¹⁶[16] *Id.* at 57.

¹⁷[17] *Id.* at 30-32 (the terminology is Jungian). This distinction deviates greatly from a lawyer's role in litigation.

¹⁸[18] *Id.* at 58-60.

be addressed and what must be postponed).¹⁹[19] The final element of the Opening Moves stage is the first four-way meeting between the couple and their attorneys, which serves primarily to affirm the formal ground rules and informal understandings of the process.²⁰[20]

The Mid-Game, or second, stage is characterized by carefully structured four-way meetings, and by pre- and post-meeting sessions between (1) a single attorney and her client, and (2) the two attorneys.²¹[21] The negotiating sessions in collaborative law are revolutionary because they enable six-way communication (see diagram of new paradigm, below), with maximum transparency, accountability, and creativity.²²[22] As Pauline Tesler explained, the clients can actually speak to each other relatively freely, “without their lawyers clamping muzzles on them” . . . and attorneys can speak to the other lawyer’s clients. This maximizes the group’s potential for creative problem solving, and makes visible if any one party creates an obstacle to resolution.²³[23] As noted earlier, the group may hire experts in fiscal, child

¹⁹[19] *Id.* at 60.

²⁰[20] *Id.* at 62.

²¹[21] *Id.* at 65.

²²[22] Tesler lecture.

²³[23] *Id.*

custody, or mental health to consult at this stage.²⁴[24] Most cases take between two and ten four-way meetings before resolution.²⁵[25]

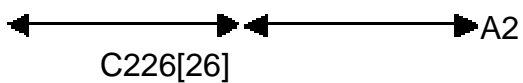
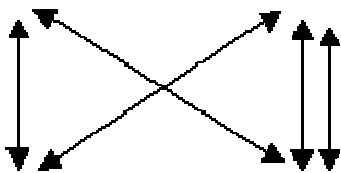
Dominant Paradigm

New Paradigm:



C1

A1



C2

A2

²⁴[24] One formal service, Collaborative Divorce, provides a prepackaged team of interdisciplinary experts. See Marcia Passos Duffy, “Collaborative Law Makes Messy Divorce Thing of the Past,” *The American News Service* article no. 1516, 7/27/00. In other cases, the group recruits experts individually.

²⁵[25] *Id.* at 66.

²⁶[26] Diagrams from Tesler book, at 79.

In the End Game, the final stage of the process, the attorneys handle the technical tasks of preparing the court papers.²⁷[27] Just as important, the End Game includes a final four-way meeting to help the clients reflect upon their successes, generosity and acts of grace; build into agreements tools for handling future disputes; and possibly provide a ceremonial marker, such as a champagne toast.²⁸[28]

B. Collaborative law and litigation

If the process described above sounds nothing like litigation, that is because it shouldn't. Some of the most common complaints that family law litigants have about the courts are "overworked, insensitive judges," "time-consuming, costly paperwork requirements," "lack of privacy and control over proceedings and outcome," and "restriction of clients' ability to tell their stories because they are not relevant to legal issues."²⁹[29] Family law lawyers bemoan their too-frequent role in litigation, of taking miserable and stressed-out clients and of "[overlitigating] their cases, exacerbating intrafamilial stress when [they] could be calming it."³⁰[30] Tesler asserts that family litigators do this not

²⁷[27] *Id.* at 69.

²⁸[28] *Id.* at 70-71.

²⁹[29] Pauline H. Tesler, "Collaborative Law: A New Paradigm for Divorce Lawyers," 5 *Psychology, Public Policy, and Law* 967 (note 13, 970).

³⁰[30] Tesler, "Collaborative Law: What It Is," at 216.

because they are bad people, but because they misconstrue a lawyer's duty of zealous representation to mean a directive to act as a hired gun, rather than an engaged moral agent working towards the client's previously-identified "highest intentions."³¹[31] She explains, "if your client had been able to solve it you wouldn't be there, so being your client's alter ego won't solve it."³²[32]

Collaborative law is also different from even a successful settlement negotiation that takes place in the context of litigation. The primary difference is that in the latter case, the parties only manage to settle because they first doggedly prepare for trial and "wave a big sword." By the time they settle (often on the courthouse steps), the process is extremely adversarial.³³[33] Accordingly, the parties have not only spent significant money to prepare for trial, but they have polarized their positions and undercut their chances for a civil, ongoing relationship. Litigation still has a place for clients who can or will not reach agreement,³⁴[34] but for the vast majority of couples, court is simply not the ideal venue for resolving the intricate, personal, emotional issues surrounding the dissolution of marriage.

C. Collaborative law and mediation

³¹[31] Tesler book, at 160.

³²[32] Tesler lecture.

³³[33] Jill Kramer, "Civilized Divorce," Pacific Sun 1, March 4, 1998.

³⁴[34] Tesler book, at 25.

Clearly, collaborative law has far more in common with mediation than it does litigation, but there are some important distinctions between the two ADR techniques. As one commentator said, the goals are the same, but the roles are different.³⁵[35] Like mediation, collaborative law is private, relatively civilized, invokes the help of a trained dispute resolution professional, and lends itself to customized resolutions and greater compliance.³⁶[36] The first significant difference, however, is that in mediations there can be a lack of built-in advice and advocacy during the negotiations;³⁷[37] in collaborative law, the lawyers work alongside their clients at the center of the negotiation, rather than on the sidelines.³⁸[38] Second, in mediation, it may be more difficult for a single neutral (who does not want to appear biased) to handle imbalances in emotional state, power, or sophistication between the parties; if the mediator cannot remedy the problem, an unfair agreement may result.³⁹[39] In collaborative law there is no neutral, and it is standard for counsel to work with her client to level the playing field.⁴⁰[40] Indeed, when a client acts unreasonably, it is part of the collaborative lawyer's job to work with the client privately to bring her around to a more rational

³⁵[35] Andrew Schepard, "Collaborative Law – Divorce," 227 N.Y. L. J. 89 (May 9, 2002).

³⁶[36] *Id.* at 8-9.

³⁷[37] Tesler, "Collaborative Law: A New Paradigm," at 973.

³⁸[38] Tesler book, at 9.

³⁹[39] Tesler, "Collaborative Law: A New Paradigm," at 973.

⁴⁰[40] Tesler book, at 97.

and enlightened position. In no other model is that part of the lawyer's role.⁴¹[41] Third, in mediation, the lawyers' roles in ensuring informed consent can come into tension with the mediator's emphasis on compromise. The lawyers in mediation have no direct responsibility for bringing the parties to settlement, and because their role is to probe for weaknesses and omissions in the agreement, they can destabilize the process; this is particularly the case when the mediator fails to incorporate the lawyers effectively.⁴²[42] Because of the structure and orientation of collaborative law, the attorneys fail to achieve the client's goal if they do not actively help to promote a settlement, and creativity is enhanced.⁴³[43] Finally, to the extent that even a successful mediation takes place close to the time of trial, there is a greater risk of damage to ongoing relationships than in the collaborative process, which comes before any resort to litigation. Mediation has been an extremely positive development in the resolution of family law disputes, but it is not a panacea. Collaborative law is not a panacea either, but it offers some strengths where mediation is lacking. The necessary question is: given collaborative law's vast potential, what are the keys to its development?

II. Development of the Practice

⁴¹[41] Amy E. Bourne, "Some Lawyers Use What Sounds Like Psychotherapy, Others Simply Avoid Litigation and Embrace Mediation and Cooperation," S.F. Daily J. Aug. 3, 1999.

⁴²[42] Tesler, "Collaborative Law: A New Paradigm" at 973.

⁴³[43] Tesler book, at 97.

A. U.S. Development: A Minnesota Export

Collaborative law is sufficiently new and its spread sufficiently documented that one can actually trace its origin back to a single day in Minnesota. Its inventor is a Minneapolis attorney named Stu Webb.^{44[44]} Webb had practiced traditional civil law for eight years, and family law for another seventeen.^{45[45]} Nearly burned-out from the adversarial, even vicious nature of family law practice, he decided to change careers, and began taking psychology classes at the local university.^{46[46]} Before long, he decided that if he had been willing to abandon the law, he had nothing to lose by trying to devise a new way to practice it—one that would allow him to do only the parts of his job he truly enjoyed.^{47[47]} Webb came up with the idea of four-way meetings quickly; it took some experimenting before he devised the process's teeth: mandatory withdrawal of the attorneys if the case turned adversarial.^{48[48]} On January 1, 1990,^{49[49]} Webb decided to “unilaterally disarm,” and exclusively practice collaborative law.^{50[50]} As one writer quipped, “he probably felt a little like the person who

^{44[44]} *Id.* at xix.

^{45[45]} Nora Bushfield, “History and Development of Collaborative Law,” available at http://www.iahl.org/articles/04_History_and_Development.htm last viewed 4/19/03.

^{46[46]} *Id.*

^{47[47]} *Id.*

^{48[48]} Douglas C. Reynolds, Doris F. Tennant, “Collaborative Law—An Emerging Practice,” 45-Dec B. B.J. 12 (Nov/Dec 2001).

^{49[49]} See Bushfield.

^{50[50]} See Quinte.

bought the first fax machine.”⁵¹[51] To get collaborative work, Webb began seeking a collaborative commitment from his opposing counsel on a case-by-case basis; eventually he started a local Institute with three other attorney members.⁵²[52] Two years later, he had handled 99 cases and all but four had reached settlement.⁵³[53]

Webb and his handful of colleagues began to speak and write widely about the new model; they first introduced it to a national audience at the 1993 conference of the National Academy of Family Mediators.⁵⁴[54] Soon thereafter, Bay Area lawyer Pauline Tesler corresponded with Webb and, using materials he shared with her, started a collaborative law group in California.⁵⁵[55] This was the first proof that the concept could be “‘transplanted’ geographically.”⁵⁶[56] As collaborative practitioners increasingly spoke and wrote on the process, more groups sprung up in Northern California.⁵⁷[57] Conferences⁵⁸[58] and the

⁵¹[51] Brian Florence, “A Different Divorce – Collaborative Lawyering,” 13-Dec Utah B.J. 18 (Dec. 2000).

⁵²[52] See Bushfield. By 2000, Webb’s group had 45 members.

⁵³[53] Pauline H. Tesler, “Collaborative Law: Where Did it Come From, Where Is It Now, Where Is It Going?” 1 Collaborative Review (May 1999).

⁵⁴[54] *Id.*

⁵⁵[55] Stu Webb, *Foreword* to Tesler book, at xvi. Tesler’s first collaborative case, in 1994, ended in reconciliation. Marcia Passos Duffy, “Collaborative Law Makes Messy Divorce Thing of the Past,” The American News Service article no. 1516, 7/27/00.

⁵⁶[56] *Id.*

⁵⁷[57] Tesler, “Collaborative Law: Where Did it Come From.”

advocacy of family law judges⁵⁹[59] played a large role in the further spread of collaborative law. No less important than word-of-mouth promotion, collaborative law was [largely] “propelled . . . by self-generated demand from practitioners for training.”⁶⁰[60] By the mid-1990’s, Webb and Tesler were conducting trainings (separately and together) all over North America.⁶¹[61] The Collaborative Review, a periodical of the International Academy of Collaborative Professionals, began publication in 1999; its Spring, 2003 issue lists in its Group Directory a total of 76 collaborative groups in 26 American states, as well as 11 Canadian groups.⁶²[62] In September 2001, Texas became the first state to adopt a statute facilitating collaborative law.⁶³[63] Several thousand attorneys in the U.S. are now practicing collaborative law.⁶⁴[64]

B. Canadian Migration

⁵⁸[58] Tesler book, at xix (“by the end of a decade, few family law conferences failed to emphasize collaborative law as an important new tool”).

⁵⁹[59] Pauline H. Tesler, “Collaborative Law Neutrals Produce Better Resolutions,” 21 Alternatives 1 (Jan. 2003).

⁶⁰[60] *Id.* at 14. An example: after hearing Tesler speak at a conference in 1999, a Texas lawyer brought Tesler to Texas, where she taught collaborative law to hundreds of Texas divorce lawyers. John V. McShane, *Foreword* to Tesler book, at xv.

⁶¹[61] See Reynolds, at 27.

⁶²[62] 15 The Collaborative Review 18-20 (Spring, 2003).

⁶³[63] Jenny B. Davis, “Texas Shows Its Softer Side,” 88-MAR A.B.A. J. 30 (March, 2002) (the Texas statute arose in response to some Texas judges’ fast-tracking of divorce cases. The new statute allows parties up to two years of breathing room once the parties notify the court that they are seeking resolution through collaborative law).

⁶⁴[64] David A. Hoffman and James E. McGuire, “Lawyers who ‘just say no’ to litigation,” Boston Globe E1 (April 1, 2001).

While collaborative law is spreading steadily in the United States, it has caught on like wildfire in Canada.⁶⁵[65] The model worked its way north from California, up the West Coast and then east from British Columbia.⁶⁶[66] Canadian lawyers in Alberta, Saskatchewan, Ontario and—increasingly— the eastern provinces have embraced it in turn.⁶⁷[67] Today, a full third of the Canadian Bar Association’s family law section is qualified to do collaborative work.⁶⁸[68]

If there is a lesson to be learned from the success of collaborative law in Canada, it is that it has fared far better in small communities than large ones. “It is more attractive in small centres where lawyers deal with each other regularly and see each other on a social basis,” one practitioner explained. “In Toronto, you might work with a lawyer from another firm once every two years.”⁶⁹[69] The practitioner also suggested that a further bar to development in large metropolitan areas is that big cities house more experienced lawyers who are more reluctant to learn a new approach.⁷⁰[70]

⁶⁵[65] See Janice Mucalov, “I’ll Never See You in Court! The Rise of Collaborative Law,” May 2001, available at <http://www.cba.org/CBA/EPIIgram/June2001/national.asp>, last viewed 4/19/03 (“Canadians take the lead . . . perhaps even outpacing the U.S.”).

⁶⁶[66] Terrence Belford, “Lawyers Taking A Collaborative Approach,” *The Globe and Mail* B8 (Sept. 9, 2002).

⁶⁷[67] “We Can Work It Out,” *Divorce Magazine .Com*, March 4, 2002, available at <http://www.divorcemag.com/news/collaborative.shtml> last viewed 4/19/03 (describing the “kinder, gentler divorce movement sweeping Canada from west to east”).

⁶⁸[68] Belford.

⁶⁹[69] *Id.*

⁷⁰[70] *Id.*

Any discussion of collaborative law, and particularly its foothold in Canada, would be incomplete without telling the story of the movement's poster child—Medicine Hat, Alberta (population 52,000). Just eighteen months after its introduction to the town, virtually all of the family lawyers in Medicine Hat were practicing collaborative law.⁷¹[71] Between September 2000 and September 2001, the family law caseload at the Medicine Hat courthouse declined 44%.⁷²[72] By 2003, the decline was nearly 85%.⁷³[73] Because twenty of the town's twenty-one family lawyers now practice collaborative law, "virtually no family law is done in the courts in Medicine Hat anymore."⁷⁴[74] So while it is hyperbole that the Medicine Hat family court has gone out of business,⁷⁵[75] a Medicine Hat practitioner reported recently that the few cases still filed are attributable to the single lawyer in town who has not joined the collaborative law group.⁷⁶[76]

⁷¹[71] Colby Cosh, "Divorce Without Poison," Fathers For Life, March 4, 2002, available at <http://www.fathersforlife.org/divorce/nopoison.htm>.

⁷²[72] *Id.*

⁷³[73] Quinte.

⁷⁴[74] "We Can Work It Out," Divorce Magazine .Com, March 4, 2002, available at <http://www.divorcemag.com/news/collaborative.shtml> last viewed 4/19/03.

⁷⁵[75] *Id.* For further proof that the court still exists, see its web site: <http://www.albertacourts.ab.ca/calendar/loc/medicinehat.htm>.

⁷⁶[76] "Collaborative Law in Medicine Hat, Alberta, Canada," reprinted email from Collaborative Law Group, available at http://www.renaissancelawyer.com/collab_law_in_medicine_hat_ab.htm (hereinafter Collaborative Law in MH). The letter's author notes that that sole litigator is "losing market share and now looking at getting the training and joining our group."

Medicine Hat's collaborative lawyers have been busy receiving delegations of western Canadian trainees, and simultaneously sending out lawyers to give talks.⁷⁷[77] They have found that the process is best suited for small cities and rural bar associations.⁷⁸[78] Janis Pritchard, the Canadian lawyer credited with bringing the collaborative model to Medicine Hat, has trained many Canadian lawyers, including a group from Regina, Saskatchewan. After more training and a concerted marketing effort, the group had nearly 150 clients sign onto collaborative law in just six months.⁷⁹[79] One of the Regina practitioners stated in a heartfelt report that collaborative law was now a common form of practice in Regina and may soon displace other forms of practice.⁸⁰[80] He asserted that one in ten Saskatchewan lawyers in private practice or legal aid had been trained in collaborative law, and added, "the cynicism that is so endemic in our profession has been largely set aside by those of us using our CL skills in practice."⁸¹[81] In true poetic fashion, the Medicine Hat collaborative group knew it had succeeded when Janis Pritchard and an associate were invited to

⁷⁷[77] Cosh.

⁷⁸[78] Collaborative Law in MH.

⁷⁹[79] R. Bradley Hunter, "Collaborative Law in Saskatchewan: A Six Month Progress Report," *The Saskatchewan Advocate*, June 2002.

⁸⁰[80] *Id.*

⁸¹[81] *Id.*

Minneapolis to share their town's practices with Stu Webb's original group.⁸²[82]

III. Tipping Lessons

Like the hopeful collaborative lawyer from Saskatchewan, Pauline Tesler postulated in 1999 that “one day, collaborative law will be the norm, and the courts will be the alternative model for divorces.”⁸³[83] That day has not yet arrived. An illustration is that when asked this year whether one “need[s] gray hair” to practice collaborative law, Tesler’s answer was “for now.”⁸⁴[84] Because (outside of Medicine Hat) few clients have friends or family who will have heard of or participated in collaborative law, they will naturally be skeptical. The gray-haired “born-again” lawyers have more credibility when avowing that collaborative law is a better way. For collaborative law to become the norm and for the movement to embrace fresh-faced young practitioners, it needs broader acceptance. It needs to transform from a good, “alternative” idea to a mainstream epidemic. Malcolm Gladwell wrote an insightful book about “the moment of critical mass, the threshold, the boiling point” that heralds that transformation: it is called the Tipping Point.⁸⁵[85]

⁸²[82] Cosh.

⁸³[83] Rochelle Williams, “Collaborating Instead of Cursing,” *Marin Independent Journal*, March 24, 1999.

⁸⁴[84] Tesler lecture.

⁸⁵[85] MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 12 (Little, Brown and Co. 2000).

Gladwell found that three types of people are central for tipping an idea, and that “simply by finding and reaching those few special people who hold so much social power, we can shape the course of social epidemics.”⁸⁶[86] The personality types he identified are Mavens, Connectors, and Salesmen.⁸⁷[87] Mavens are almost obsessive collectors of information, people who know the inside scoop, and are eager to share with people the best ways of doing things.⁸⁸[88] Applied to collaborative law, a Maven may be the client who voraciously studies the processes available to divorcing parties, or the collaborative practitioner who researches the model and collects “best practices” from other practitioners. Gladwell’s second group of people is the Connectors, people who seem to know everyone and have an extraordinary knack for making both friends and acquaintances.⁸⁹[89] The “strength of [connectors’ many] weak ties” means that by having a foot in many different worlds, connectors bring them all together.⁹⁰[90] Formal efforts, like the talks Stu Webb gives at family law conferences, and newsletters like *The Collaborative Review*, may partly serve the Connector function, though it is not as clear who the Connectors are on the

⁸⁶[86] *Id.* at 259.

⁸⁷[87] *Id.* at 34.

⁸⁸[88] *Id.* at 62.

⁸⁹[89] *Id.* at 38, 41.

⁹⁰[90] *Id.* at 54, 51.

client side.⁹¹[91] The third personality type is the Salesman, someone possessing “something powerful and contagious and irresistible that goes beyond what comes out of his mouth, that makes people who meet him want to agree with him. It’s energy. It’s enthusiasm. It’s charm. It’s likability . . . yet something more.”⁹²[92]

The role of Salesman may be the most critical in the development of collaborative law in this country. Soon after Pauline Tesler’s California colleagues started their own collaborative law group, they found that some of their collaborative practices were flourishing and others’ languishing.⁹³[93] Tesler eventually realized that the lawyers whose collaborative practices were the most successful were the lawyers “whose enthusiasm and conviction about the model were so genuine that these lawyers could not contain their excitement when they spoke about how collaborative law works.”⁹⁴[94] The verbal messages that these successful collaborative lawyers were sending their clients reflect another of Gladwell’s principles: to succeed, a message needs to be sticky.⁹⁵[95] The successful collaborative lawyers said to their clients something along the lines of, “collaborative law is something I really believe in, and I know I can offer superior

⁹¹[91] Publications like Divorce Magazine and in-person or online support groups may ultimately serve this function.

⁹²[92] *Id.* at 73.

⁹³[93] Tesler book, at 37.

⁹⁴[94] *Id.*

⁹⁵[95] TIPPING POINT, at 92.

professional services to you in that model.”⁹⁶[96] This is a far stickier message than the one that the less successful practitioners used: “. . . maybe it will work and maybe it won’t, but I’m willing to try it if you are.”⁹⁷[97]

Stickiness is critical, but so is context. It makes perfect sense that collaborative law would catch on faster in small towns than in big cities. One scholar who would likely agree is sociologist Robert Putnam, who studied the decline of social capital (or connectedness) in America.⁹⁸[98] Social capital is important for a number of reasons. Among these are that it allows citizens to resolve collective problems more easily, it “greases the wheels” that allow communities to move forward smoothly, and it widens people’s awareness of the many ways in which their fates are linked.⁹⁹[99] Small towns have greater social capital than metropolitan cities: formal volunteering, involvement in community projects, charitable giving, blood donation, and even church attendance are more common in the former.¹⁰⁰[100] What this social connectedness means in terms of collaborative law is first that no one wants to fight ugly fights against people we are close to, or at least who we will run into again and again—this is true for

⁹⁶[96] Tesler book, at 37.

⁹⁷[97] *Id.*

⁹⁸[98] See *generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (Simon & Schuster 2000). Though Putnam’s focus was America, there is no reason to believe that his findings do not translate to Canada, particularly the broad brush strokes I am applying here.

⁹⁹[99] *Id.* at 288-89 (adding that without social capital, “people are more likely to be swayed by their worst impulses”).

¹⁰⁰[100] *Id.* at 119, 206-07.

lawyers and clients. This point can't be overstated; collaborative lawyers are most persuasive when they remind a client about having to face her ex at their daughter's wedding, and their grandchildren's christening table.

The second thing that social connectedness means in this context is that when collaborative law experiences some success in a small area, the social connectedness there helps it spread. This buy-in is particularly critical when the "product" is not Hush Puppy shoes (Gladwell's first example) but the process one chooses to facilitate an incredibly personal and painful life passage. That in Canada the model seems to have spread through small towns, and in the U.S. between major metropolitan areas, may mean that in lieu of small town social capital, the U.S. movement will rely more heavily on the skills of people promoting it, and their enthusiasm for the product. This is not necessarily problematic, for as Gladwell found, "what must underlie successful epidemics, in the end, is a bedrock belief that change is possible, that people can radically transform their behavior or beliefs in the face of the right kind of impetus."¹⁰¹[101] (258)

Collaborative law has some impassioned Salesmen, and the stickiest of messages: collaborate and save yourself from the horrors of family court. It has delivered on that message for clients, and it has shown family practitioners that their work can be meaningful and even enjoyable. The movement is spreading,

¹⁰¹[101] TIPPING POINT, at 258.

has skilled and enthusiastic trainers and even a poster child (Medicine Hat, Alberta). There is every reason to hope it will tip before I turn gray.\

Re-printed with permission of author for members of MCLA.

Rebecca Glass is a third year law student at Boalt Hall, interested in ADR, who will be clerking for the Honorable Michael Daly Hawkins of the Ninth Circuit next year.

WORKS CITED

Articles

1. 15 The Collaborative Review 18-20 (Spring, 2003).
2. "A Brief History of Collaborative Family Law," Quinte Collaborative Law Association, February 26, 2003, available at http://www.quintecollaborative.org/QCLA_History.html, last viewed 4/19/03.
3. "CollaborativeLaw in Medicine Hat, Alberta, Canada," reprinted email from Collaborative Law Group, *available at* http://www.renaissancelawyer.com/collab_law_in_medicine_hat_ab.htm
4. "We Can Work It Out," Divorce Magazine .Com, March 4, 2002, *available at* <http://www.divorcemag.com/news/collaborative.shtml> last viewed 4/19/03.
5. Terrence Belford, "Lawyers Taking A Collaborative Approach," The Globe and Mail B8 (Sept. 9, 2002).
6. Amy E. Bourne, "Some Lawyers Use What Sounds Like Psychotherapy, Others Simply Avoid Litigation and Embrace Mediation and Cooperation," S.F. Daily J. Aug. 3, 1999.
7. Nora Bushfield, "History and Development of Collaborative Law," *available at* http://www.iahl.org/articles/04_History_and_Development.htm last viewed 4/19/03.
8. Colby Cosh, "Divorce Without Poison," Fathers For Life, March 4, 2002, *available at* <http://www.fathersforlife.org/divorce/nopoison.htm>.
9. Jenny B. Davis, "Texas Shows Its Softer Side," 88-MAR A.B.A. J. 30 (March, 2002).
10. Marcia Passos Duffy, "Collaborative Law Makes Messy Divorce Thing of the Past," The American News Service article no. 1516, 7/27/00.
11. Brian Florence, "A Different Divorce – Collaborative Lawyering," 13-Dec Utah B.J. 18 (Dec. 2000).

12. David A. Hoffman and James E. McGuire, "Lawyers who 'just say no' to litigation," *Boston Globe* E1 (April 1, 2001).
13. R. Bradley Hunter, "Collaborative Law in Saskatchewan: A Six Month Progress Report," *The Saskatchewan Advocate*, June 2002
14. Jill Kramer, "Civilized Divorce," *Pacific Sun* 1, March 4, 1998.
15. Janice Mucalov, "I'll Never See You in Court! The Rise of Collaborative Law," May 2001, *available at* <http://www.cba.org/CBA/EPilgram/June2001/national.asp>, last viewed 4/19/03.
16. Andrew Shepard, "Collaborative Law – Divorce," 227 *N.Y. L. J.* 89 (May 9, 2002).
17. Pauline H. Tesler, "Collaborative Law: A New Paradigm for Divorce Lawyers," 5 *Psychology, Public Policy, and Law* 967 (1999).
18. Pauline H. Tesler, "Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It," 13 *Am. J. Fam. L.* 215 (1999).
19. Pauline H. Tesler, "Collaborative Law: Where Did it Come From, Where Is It Now, Where Is It Going?" 1 *Collaborative Review* (May 1999).
20. Pauline H. Tesler, "Collaborative Law Neutrals Produce Better Resolutions," 21 *Alternatives* 1 (Jan. 2003).
21. Rochelle Williams, "Collaborating Instead of Cursing," *Marin Independent Journal*, March 24, 1999.

Books

22. MALCOLM GLADWELL , *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (Little, Brown and Co. 2000).
23. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (Simon & Schuster 2000).
24. PAULINE H. TESLER, *COLLABORATIVE LAW* (Section of Family Law, American Bar Association 2001).

Misc.

25. Pauline H. Tesler, lecture at Boalt Hall negotiations class (April 4, 2003).

26. Alberta Court Information, *available at*
<http://www.albertacourts.ab.ca/calendar/loc/medicinehat.htm>.
